No. 93-142

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

DONALD R. BURKS,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

Petition for a Writ of Certiorari to the United States Court of Military Appeals

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the petitioner was deprived of his due process right to present a defense when the military trial judge excluded from evidence a statement in which another person admitted to committing the murder for which the petitioner was convicted.

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PETITION FOR WRIT OF CERTIORARI

The petitioner, Donald R. Burks, respectfully prays that a writ of certiorari issue to review the order and judgment of the United States Court of Military Appeals entered in his case on April 29, 1993.

OPINIONS BELOW

The order and judgment of the United States Court of Military Appeals is reported at 36 M.J. 447 (C.M.A. 1993) (Appendix A). The unreported opinion of the United States Air Force Court of Military Review, issued on August 26, 1991, is found at Appendix B.

JURISDICTION

The final order of the United States Court of Military Review was entered on April 29, 1993. The jurisdiction of this Court is invoked under 28 U.S.C.A. § 1259(3) (Supp. 1992) and 10 U.S.C.A. § 867(a) (Supp. 1992).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment of the Constitution of the United States provides in relevant part:

> No person shall . . . be deprived of life, liberty, or property, without due process of law . . . .

STATEMENT OF THE CASE

Sgt. Joseph Handy was brutally murdered during the early morning hours of 25 September 1989 while he was at work at George AFB, California. Although the exact cause of death was not immediately known, it was readily apparent that Sgt. Handy had suffered massive trauma to his head and face.

Approximately three weeks after the murder, the petitioner, a Master Sergeant (E-7) in the United States Air Force, after failing a polygraph test, became the primary suspect in the murder. The petitioner was arrested and placed in pre-trial confinement. While the petitioner was in pre-trial confinement a letter in which another person confessed to committing the murder was found in a prison van. The letter was a hand-written statement from a third party known only as "Michael" who claimed that it was he and several others that killed Joe Handy. Investigators found no evidence indicating that the petitioner authored the letter. The petitioner's handwriting and that in the letter are very different. (App.Ex. XXVIII, Atch 2 and Atch 3). The tests of the questioned documents examiner were inconclusive. (App.Ex. XXVI, paragraph 8). The only identifiable fingerprints on the letter were those of

law enforcement agents. (*Id.*, paragraph 5). At the time of trial Michael had not been located.

On various dates in February and April 1990, the petitioner was tried by a general court-martial composed of officer members at George Air Force Base, California. The military judge who presided over petitioner's trial refused to admit into evidence the exculpatory letter written by Michael. Thus, contrary to the petitioner's pleas, he was convicted of murder in violation of Article 118 [10 U.S.C. § 918] and assault with intent to inflict grievous bodily harm in violation of Article 128 [10 U.S.C. § 928].[1] He was sentenced to a dishonorable discharge, confinement for the rest of his natural life and reduction to airman basic (E-1).

On appeal, *inter alia*, the appellant raised the issue of whether he was deprived of his due process right to present a defense when the military trial judge excluded from evidence the letter in which another person admitted to committing the murder for which the appellant was convicted. The Air Force Court of Military Review denied the request for relief in their opinion dated 26 August 1991. (Appendix B).

The Court of Military Appeals granted review of that decision on 22 May 1992. The Court subsequently, on further consideration affirmed the decision of the United States Air Force Court of Military Review. (Appendix A.)

REASONS FOR GRANTING THE WRIT

The petitioner was denied a fundamental constitutional right of due process when the military judge who presided over his trial denied the admission of what amounted to exculpatory and exonerating evidence. Even if the letter in this case did not fit squarely into a traditional

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[1] The petitioner was charged with premeditated murder but the court members found him guilty of murder without premeditation.

hearsay exception since the author of the letter was never located, fundamental constitutional principles dictate that the evidence be available for the fact finder to weigh with all the other evidence in the case:

> [W]here constitutional rights directly affecting the ascertaining of guilt are implicated the hearsay rule may not be applied mechanistically to defeat the ends of justice.

Chambers v. Mississippi, 410 U.S. 284 (1973). Those rights are implicated here.

In *Washington v. Texas*, 388 U.S. 14 (1967), this Honorable Court held that the right to present a defense is a fundamental element of due process of law. In that case two Texas statutes prohibited the testimony of witnesses who were involved in the same crime as that charged against the accused. This Court found that the statutes at issue unconstitutionally impeded the right to present a defense. *Id.*, at 18-19.

In *Chambers* this Court expanded the right to present a defense to include the presentation of hearsay which has sufficient indicia of reliability but does not technically fall within a hearsay exception. The hearsay exception involved was the declaration against interest. This Court concluded that no reason exists to exclude exculpatory hearsay evidence having indicia of reliability simply because it does not fit within a recognized exception to the hearsay rules.

A review of the applicable case law demonstrates that three primary reasons are cited in those cases where residual hearsay offered by an accused has been excluded. First, the hearsay is not reliable. *See Ferreira v. Fair*, 732 F.2d 245, 248 (1st Cir.), *cert. denied*, 469 U.S. 1017 (1984) (statement not against interest when made and not corroborated). Second, the evidence is not vital to the defense theory. *See Sharlow v. Isreal*, 767 F.2d 373, 376-80 (7th Cir. 1985), *cert. denied*, 475 U.S.

1022 (1986). Third, the hearsay declarant is available to testify. *See United States v. Chanya,* 723 F.2d 374 (5th Cir.), *cert. denied,* 466 U.S. 943 (1984). None of these conditions exist in the case *sub judice.*

The evidence in this case establishing the indicia of relability mandated admission of the exculpatory letter under the residual hearsay exception especially when viewed in the context of the petitioner's fundamental constitutional right to present a defense. The trial judge, the Air Force Court of Review and the United States Court of Military Appeals erred by finding the indicia of reliability insufficient to allow submission of the letter to the fact finder.

First, statements in the letter were factually correct. The letter states that the victim's father was deceased; this is true. The letter states that the victim's brother was killed; the victim's brother died in a fire in 1988. The letter states that the victim was under investigation for child molestation; this was true. (App.Ex. XXVIII, Atch 2; App.Ex. XXIX).

Second, the events described in the letter are corroborated by other evidence. The letter describes a weapon with a star on the shaft as being used in the killing of Sgt Handy. Only the baseball bat was recovered. Dr. Root, the forensic pathologist, called by the prosecution, testified that he did not believe that a baseball bat alone caused the injuries and that definitely more than one weapon was used. (R. 880, 883). Dr. Root had performed over 20,000 autopsies in his career and stated he had never seen anything quite like the injuries in this case from blunt force alone. (R. 867). The prosecution's case was solely based upon a theory of a blunt force mechanism caused by the petitioner acting alone.

Dr. Root also testified that the injuries could have been caused by more than one person. (R. 884). The letter states that persons other than the petitioner killed

Sgt Handy. A criminalist with the U.S. Army Crime Laboratory compared a bloody shoe-print found on the victim's shirt with the prints of shoes taken from the petitioner; he found no similarities. (App.Ex. XXVI, paragraph 9). The letter says the killers wore some type of star on the cheek. The petitioner testified that the killers wore star-shaped earrings. (R. 1122). An earring back was found at the crime scene. (R. 687). The floor where the earring was found had been thoroughly cleaned the night of the murder, prior to the murder. The janitor who cleaned the floor testified that his cleaning would have picked up the earring if it was there when he cleaned. (R. 1018).

Third, investigation of the letter's source disclosed no evidence of fabrication. Investigators took handwriting exemplars from all persons who were told about the killing by the petitioner. A questioned documents examiner was unable to determine the author of the letter. (App. Ex. XXVI, paragraphs 7 and 8).

Fourth, investigators found no evidence indicating that the petitioner authored the letter. The petitioner's handwriting and that in the letter are very different. (App.Ex. XVIII, Atch 2 and Atch 3). The tests of the questioned documents examiner were inconclusive. (App.Ex. XXVI, paragraph 8). The only identifiable fingerprints on the letter were those of law enforcement agents. (*Id.*, paragraph 5). The Air Force Court of Review not only engaged in fanciful speculation but totally ignored the evidence when it held that "the timing and location of its discovery suggests one plausible theory which is that the appellant placed the letter in the military van, perhaps under the rear of the driver's seat of the vehicle, and it finally worked its way forward on the day of its discovery." *United States v. Burks*, ACM 28760 (A.F.C.M.R., 26 August 1991), at 5. (Appendix B).

The fact of the matter is that the appellant had absolutely no opportunity to plant the letter. The prosecution

stipulated that the individual in charge of the confinement facility would tesify to this fact. (App. Ex. XXVI, paragraph 3). The appellant was in handcuffs and in the company of a guard and other prisoners at all times on the morning the letter was found. It also is quite incredible that a letter can "work its way forward" the entire distance under the seat of a van, across the front floorboard and lodge itself under a brake pedal. It is particularly incredible considering on base driving speeds and the fair presumption that the confinement officer was not driving a government van full of prisoners in an erratic manner.

Fifth, the letter talked extensively about Sgt Handy's homosexuality. Special Agent (SA) Filipiak testified that in his investigation several people told him that Sgt Handy had feminine characteristics (R. 686) and an Electronic Mail message found on Sgt Handy's computer did lend some credence to the fact that he may have been a homosexual.

Sixth, the letter states that a group of homosexuals which had formed somewhat of a cult had killed Sgt Handy. SA Filipiak testified that through his training and experience homosexual murders are often associated with violent deaths in which they frequently mutilate the face. (R. 685). No one could dispute that Sgt Handy's face was severely mutilated.

Lastly, the author of the letter regrets that his "brothers" threatened the petitioner and his family. (App.Ex. XXVIII, Atch 1 at page 4). Major Merijeanne Moore, an Air Force psychiatrist, conducted extensive clinical evaluation and testing of the petitioner. She concluded that the petitioner's personality is such that he would falsely confess to a crime if he were protecting someone whom he felt an obligation to protect. She also concluded that the petitioner is unlikely to commit a crime of violence such as that in this case. (R. 1068). The

petitioner testified that the killers threatened to injure his children if he said anything about them within four weeks of the murder. (R. 1104, 1115, 1125, 1133-34).

These facts combined with the fact that there was an extremely psychologically coercive environment leading up to and surrounding the petitioner's confession explain why petitioner may have admitted to committing a crime he did not commit. More pertinently, these factors establish *why another explanation for the murder should have gone to the jury.*

Thus, all the indicia of reliability mentioned above mandated the admission of the letter under the residual hearsay exceptions. Mil. R. Evid. 803(24) and 804(b)(5).

In addition to having indicia of trustworthiness, for admissibility under the residual hearsay exception the evidence must also satisfy three additional criteria. First, the evidence must be relevant. Second, the evidence must be more probative on the point than other evidence available to the proponent. Third, the general purposes of the rules and the interests of justice support admission of the evidence. Mil. R. Evid. 803(24). The relevance of the letter is undisputed. The second and third criteria compel admission of this letter.

The military judge found that another form of evidence available to the petitioner was just as probative as the letter: the petitioner could testify. (R. 63). The reasoning of this conclusion fails for several factual and legal reasons.

The alternative given the petitioner by the military judge violates the petitioner's constitutional right not to testify. A servicemember may assert his right not to testify "without fear of exploitation." *United States v. Clifton*, 15 M.J. 26, 30 (C.M.A. 1983). The petitioner's testimony was the only alternative mentioned by the military judge in deciding that other forms of proof

equally as probative of the letter were available to the petitioner. Even assuming that the petitioner had the same substantive knowledge of the facts as the author of the letter, the military judge in effect forced the petitioner to either testify or forego presentation of the evidence. This dilemma "exploits" and renders meaningless the right not to testify.

Furthermore, no evidence exists to show that the petitioner could competently testify about the matters referenced in the letter. The author of the letter was purportedly the victim's homosexual lover who knew why the other members of the homosexual group wanted to kill the victim. The petitioner certainly does not have such firsthand knowledge.

The military judge's exclusion of the letter because other equally probative evidence was available to the petitioner is legally and factually erroneous. The letter corroborates the petitioner's retraction of his confession. The military judge's conclusion that the petitioner's testimony would be equally as probative as the letter places the petitioner in the untenable position of corroborating himself. This defies reason. In addition, a letter written by a third party exonerating the accused will almost always be more probative on the point than the accused's own testimony. This is true because, as prosecutors are always quick to point out, the accused has a greater motive to lie than anyone else. Thus, the letter was critical to corroborating the petitioner's retraction of his confession. Finding that the petitioner could testify as an alternative to admission of the letter impermissibly compelled the petitioner to either testify or forego presentation of evidence contained in the letter. On both grounds the finding is incorrect.

Finally, the purposes of the rules and the ends of justice support admission of the letter. The Military Rules of Evidence should be construed to secure fairness and pro-

mote ascertaining the truth. Mil.R.Evid. 102. This letter was critical to the petitioner's defense. Once reliability is indicated the fact-finder should have the opportunity to evaluate the evidence and either accept or reject it.

In *Pettijohn v. Hall*, 599 F.2d 476, 481 (1st Cir. 1979), the court stated:

> If the Supreme Court cases of *Washington v. Texas* . . . and *Chambers v. Mississippi* . . . mean anything, it is that a judge cannot keep important yet possibly unreliable evidence from the jury.

This Honorable Court has long recognized the fundamental right of a criminal accused to present evidence which is relevant, material and favorable to his defense. *See, United States v. Valenzuela-Bernal*, 458 U.S. 858 (1982); *Davis v. Alaska*, 415 U.S. 308 (1974).

Moreover, the exclusion of this critical evidence cannot be deemed harmless beyond a reasonable doubt. Numerous witnesses testified concerning the petitioner's peaceful character. (R. 991, 995, 1004, 1015). When the evidence which corroborates the authenticity of the letter is combined with the factual background leading up to the confession (which supported a credible argument of psychological coercion) and the evidence concerning why the petitioner might have confessed to a crime he did not commit, admission of the letter could have caused the members to have a reasonable doubt of the petitioner's guilt.

The trial judge's final conclusion that any possible probative value of the letter is substantially outweighed by the danger of confusion of the issues (R. 64) is puzzling. The letter directly paralleled the petitioner's testimony and the defense's theory of the case. The court members would have either believed the letter or not believed it but they certainly would not have been confused by it.

Petitioner therefore asks that he be afforded a fair trial and that this Court demand that the trier of fact be properly provided with all the relevant evidence so that the decision at the trial level is made in light of a fair assessment of all the available evidence. The court-martial should have had the opportunity to consider the letter. Due process and fundamental fairness demands it.

CONCLUSION

Most evidentiary issues litigated before courts across the land involve some aspect of the issue of whether prosecution evidence was properly admitted against an accused. This case is unique in that it deals with whether an accused should have been permitted to present exculpatory evidence in his defense. To deny a criminally accused such a right in a military court runs afoul of the most basic and fundamental of constitutional principles. Indeed the right to present a defense is the cornerstone of Anglo-American jurisprudence. One of the distinguishing features of tyrannical government is the accused's lack of a right to present an effective defense.[2] The petitioner was denied the opportunity to present an effective defense by the military judge's exclusion of critical exculpatory evidence. Even accepting the premise that there may have been a question as to the admissibility of the evidence, the question should have been resolved in favor of the petitioner. *Chambers v. Mississippi*, 410 U.S. 284 (1973); *Washington v. Texas*, 388 U.S. 14 (1967).

In excluding the exculpatory letter from evidence the military judge effectively predetermined the petitioner's guilt and took the trial out of the jury's hands. When a trial judge fears that a jury receives exculpatory evidence the trial judge has usurped the function of the jury. In-

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[2] Edward J. Imwinkelried, *Exculpatory Evidence* (1990).

deed "the manifest destiny of evidence law is a progressive lowering of the barriers to truth." [3]

The petitioner does not now ask that this Honorable Court fully exonerate him and wipe the slate clean. The petitioner only asks that this Honorable Court allow him a fair trial where exculpatory evidence is not hidden from the jury. No one except one who has predetermined guilt should fear that a jury will receive all the relevant evidence. The petitioner's final plea therefore, as he faces incarceration for the rest of his natural life, is only that this Honorable Court allow a jury to see all the evidence in this case.

Respectfully submitted,

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[3] Charles T. McCormick, *Handbook of the Law of Evidence* (1954).

APPENDIX A

UNITED STATES COURT OF MILITARY APPEALS

No. 67,494

ACM 28760

UNITED STATES,

Appellee

v.

DONALD R. BURKS, JR., Master Sergeant
U.S. Air Force,

Appellant

Argued November 4, 1992

Decided APR 29 1993

Counsel

For Appellant: *Captain George F. May* (argued); *Major Alice M. Kottmyer* (on brief); *William J. Holmes, Colonel Jeffrey R. Owens, Lieutenant Colonel Terry J. Woodhouse.*

For Appellee: *Lieutenant Colonel Jeffrey T. Infelise* (argued); *Lieutenant Colonel Brenda J. Hollis, Major Morris D. Davis, Captain David C. Wesley* (on brief); *Colonel Richard L. Purdon* and *Major Paul H. Blackwell, Jr.*

Military Judge: Michael B. McShane

Opinion of the Court

WISS, Judge:

A general court-martial with officer members tried appellant for premeditated murder and aggravated assault, *see* Arts. 118 and 128, Uniform Code of Military Justice, 10 USC §§ 918 and 928, respectively. After a contested trial, the members convicted appellant of unpremeditated murder and aggravated assault, and sentenced him to a dishonorable discharge, confinement for life, and reduction to the lowest enlisted grade. The convening authority approved these results, and the Court of Military Review unanimously affirmed them in an unpublished opinion dated August 26, 1991.

On appellant's petition, this Court granted review of four issues, three of which address evidentiary questions at trial and the fourth concerns multiplicity of his two convictions for sentencing purposes. Now, after further review, we affirm.

On the morning of September 25, 1989, Sergeant Handy was savagely beaten to death by repeated blows to and about his head while working alone on a night shift in the civil engineering service-call office. Behavioral Analysis Interviews by agents of the Office of Special Investigations (OSI) narrowed the list of possible suspects to about twelve, including appellant. A number in that group agreed to take polygraphs; appellant's result was interpreted as deceptive on some critical questions, so he then "became a suspect."

Over the next 2½ days, appellant voluntarily submitted himself to interrogation by OSI agents on repeated occasions and consented to searches of his house, car, gym locker and bowling alley locker. Ultimately, appellant confessed to killing Handy by numerous blows with an aluminum baseball bat. Appellant followed his oral confession with "his own typed version," which then was

"expanded upon in a second type[d] confession" that appellant signed.

Appellant's confessions reflect outrage at Handy's alleged admission to having molested a young girl and his alleged bragging that he was getting away with it. Appellant apparently decided to beat Handy to scare him into not repeating such conduct. After he had beaten him with the bat in Handy's office, appellant "escorted" him to the men's bathroom to assist Handy in cleaning up the blood; however, once there, he initiated a second beating that killed Handy.

Three days later, appellant "recanted his confession[s]" and claimed that OSI agents had induced him into making them. In their stead, he claimed that three men with "stars painted on their cheeks and earrings in their right ears" had "forced him to" take them to where Handy worked, where two of them beat him to death with a bat and an unusual weapon of some sort. He stated that they threatened to injure his children if he mentioned any word of this assault for 4 weeks. Unpub. op. at 2.

With this brief evidentiary background, we can proceed to consider appellant's complaints of error.

I

WHETHER THE MILITARY JUDGE ERRED TO THE SUBSTANTIAL PREJUDICE OF APELLANT BY EXCLUDING EXCULPATORY EVIDENCE THEREBY DENYING APPELLANT HIS DUE PROCESS RIGHT TO PRESENT A DEFENSE.

A

About 2 months after appellant had recanted his confessions, security police found a 16-page, handwritten letter under the brake pedal of an unlocked van that had

been used to transport prisoners. The letter was addressed to appellant and was signed by "Michael," who claimed that he had been Handy's "homosexual lover." Unpub. op. at 3.

According to an OSI transcription of the letter, which has been stipulated to as authentic, "Michael" explained that he had written because he wanted appellant "and all Joseph's [Handy's] friend [sic] to know the truth about Joseph and why he died." This "truth" was that Handy, through "Michael," had become entwined in a cult "family" that was involved with drugs and child sex; Handy purportedly never had engaged in such activities himself and had, instead, gathered a "package" of incriminating information to turn over to officials. "Michael" revealed: "Joseph was sacrificed by the family because he was going to betray our father [the leader of the cult] by turning over information to the air force official [sic] just to clear his name. Our brother in faith brother Rodriguez and brother Martinez and brother Williams was [sic] told by our father in faith to kill Joseph and get the information he had about our family." "Michael" also mentioned unusual trademarks of such an assassination by the "family," such as a weapon with "a star on it" and the assassin wearing a star on his or her right cheek.

Appellant had ridden in the van the morning that the letter was found, but he had ridden in the back seat with other prisoners and had been handcuffed. Authorities were unable to determine who had written the note or how it had been placed in the van. Further, the letter indicated that "Michael" also had "written letter [sic] to the local newspapers and Air Force authorities explaining everything that happen [sic] and why. I sent Air Force authorities a list of names and numbers also a map." Notwithstanding, no additional communications from "Michael" ever came to light.

B

The defense indicated from the outset of trial that its theory of the case was that a homosexual cult, not appellant, had killed Handy and that appellant had confessed only to protect his children from the threatened harm to them if he talked within a month of the incident. Although the defense relied upon various items of evidence and testimony to support this theory, the two principal pillars upon which it was to be built were appellant's own testimony to this effect and the letter from "Michael."

Accordingly, prior to trial, appellant moved to admit, *inter alia,* "Michael's" letter. Defense counsel offered four bases for admission: constitutional due process; Mil.R. Evid. 804(b)(3), Manual for Courts-Martial, United States, 1984, statement against interest; Mil.R.Evid. 804 (b)(5), residual hearsay exception where declarant is unavailable; and Mil.R.Evid. 803(24), residual hearsay exception where the declarant's availability is immaterial. Assistant trial counsel objected, contending that there was no assurance at all that this hearsay evidence was trustworthy.

After spirited litigation, the military judge denied the motion. As to Mil.R.Evid. 804(b)(3), the military judge noted that such statements "are not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statements." He concluded that he did "not find a clear indication of trustworthiness of the statement in this case. The fact that some of the details in the statement are true does not serve to validate the entire statement. The fact that the declarant is unknown makes it impossible to attach any credibility or trustworthiness to the statement."

The military judge applied the same analysis to the requirements of Mil.R.Evid. 803(24) and 804(b)(5), each of which requires "equivalent circumstantial guaran-

tees of trustworthiness" as are found in the specific hearsay exceptions. He determined that "there is absolutely no way to test the trustworthiness of what amounts to an anonymous statement, a statement by an unknown author." He similarly rejected the argument that constitutional due process required admission of the letter: "The statement has none of the persuasive assurances of trustworthiness found by the Supreme Court in *Chambers versus Mississippi*[, 410 U.S. 284 (1973)]."

In sum, as to all four bases urged by the defense, the military judge's conclusion is best reflected by the following comment: "This anonymous letter does not even come close to the threshold requirements for trustworthiness and reliability." Furthermore, as a final point, the military judge applied the standard of Mil.R.Evid. 403 and found "that any possible probative value of this statement is substantially outweighed by the danger of confusion of the issues in the case. This application of M.R.E. 403 also leads me to conclude that the statement will not be admitted."

C

In this Court, as he did in the Court of Military Review, appellant continues to urge the same bases for admissibility of the letter.[1] To support his burden as the profferer of the hearsay evidence to show that the letter comes within an exception to the rule excluding hearsay, *see* Mil.R.Evid. 802, appellant has pointed to a number of factors that he contends are circumstances assuring trustworthiness, *see* Mil.R.Evid. 803(24) and 804(b)(3) and (5). We are not persuaded.

Each of the factors urged by appellant seems to fall into one of three general categories. First, appellant

[1] The granted issue, raised by appellant, appears to be more restricted in its theory of error; since appellant argues all four bases in his brief, however, we will consider them.

argues that certain "statements in the letter are factually correct." Final Brief at 14. For instance, the letter states that Handy's "father was deceased" and that his brother had been killed, as well as that Handy had been "under investigation for child molestation." Notwithstanding their claimed truth, none of these factors was outside the realm of possible knowledge of any number of people, including appellant. Indeed, in his confessions made 2½ days after Handy's murder, appellant unequivocally revealed his awareness that Handy had been a suspected child sexual abuser. Moreover, as Handy's supervisor and co-worker, appellant could reasonably be expected to know certain highlights of Handy's family history.

Second, certain events or other statements in the letter "are corroborated by other evidence." Final Brief at 15. The letter, for instance, describes the lethal weapon as one with a star on it and indicates that more than one person was involved in the murder. In comparison, other evidence of record indicates that some of the blows to Handy may have been delivered by some weapon other than a baseball bat—which was the only murder weapon recovered—and that a bloody shoeprint on Handy's chest did not match any of the footwear found in appellant's quarters—permitting the inference that someone other than or in addition to appellant was involved.

Neither these examples nor other "corroboration" urged by appellant are particularly telling, however. For instance, appellant's own recantation 2 full months before the letter was found mentioned killers associated in various ways with stars and that the killers had used a bat and some other "unique weapon." Unpub. op. at 2. As to the shoeprint, the Government appropriately suggests that appellant could easily have disposed of his bloody shoes after murdering Handy. Answer to Final Brief at 5. In other words, any coincidence between statements in the letter and other evidence is not necessarily probative

at 300. Yet, they had been excluded from evidence because of mechanical application of the rules of evidence.

The residual hearsay exceptions are a giant step toward resolving that injustice within the evidence code. *See also* Mil.R.Evid. 102 ("These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined."). In any event, nothing in *Chambers* supports the proposition that a defendant, who otherwise is permitted to present his defense, is denied constitutional due process of law because certain evidence—the fundamental trustworthiness of which is wholly unestablished by the defendant—is excluded from the trial. *See United States v. Hinkson*, 632 F.2d 382, 386 (4th Cir. 1980).

II

WHETHER THE MILITARY JUDGE ERRED TO THE SUBSTANTIAL PREJUDICE OF APPELLANT BY ADMITTING INTO EVIDENCE CERTAIN SCIENTIFIC EVIDENCE NOT ACCEPTED AS CONCLUSIVE IN THE SCIENTIFIC COMMUNITY.

A

Before trial on the merits began, trial counsel advised the military judge that he intended to question Agent McGibbon regarding a "presumptive-positive" luminol test for blood in passenger areas of appellant's car. That test was run in the course of a consent search of the car during the period of appellant's interrogation. Defense counsel pointed out that subsequent tests did not show positive in these areas but showed positive only on carpeting in the car's trunk. Assistant trial counsel re-

sponded that these subsequent tests were "*less sensitive*" than luminol (that is, required more blood to be present in order to show positive) but "*more accurate*" than luminol (that is, would not show positive for some chemical substances similar to blood that would show positive in the luminol test).

The prosecutor explained that he wanted to elicit testimony about the luminol test merely to show the progress of the OSI investigation and to explain, in part, why that investigation had focused on appellant. He went on to suggest limiting instructions as to this purpose. Then, in response to defense objection, he further argued that any possible prejudice to appellant would be overcome by other evidence showing the results of the subsequent tests.

In due course, the military judge overruled appellant's objection. He remarked: "I don't see the information as being particularly prejudicial. It has some probative value, and the individual [Agent McGibbon] . . . [could] explain the limited usage of the test. That information will be of some assistance to the court in deciding the case." *See* Mil.R.Evid. 403. He reminded trial counsel of his offer to provide appropriate limiting instructions.

During trial, Agent McGibbon testified as anticipated. He explained that he had tested certain parts of appellant's car for blood. First, he used phenolphthalein, which tested negative; then he used luminol, which showed a presumptive positive in certain areas. As a result of that presumptive positive, he "asked the local sheriff's department to conduct further testing. . . . He testified that luminol is only a presumptive test" that required "further confirmatory testing." Further, he indicated that the presumptive positive was not necessarily "caused by blood, much less by *human* blood." Answer to Final Brief at 9-10.

After Agent McGibbon had finished, the military judge instructed the members as follows:

> Members, when Mr. McGibbon testified, he talked about luminol testing. Since the luminol testing is essentially a screening test, you may not consider the testimony as to the luminol testing as confirming the results indicated. The evidence as to the luminol testing was presented for the limited purposes of showing the OSI's continuing efforts and why the accused continued to be a suspect and not to confirm the presence of blood in the accused's vehicle. Any questions? Apparently not.

Thereafter, Mr. Gregonis, a forensic serologist in the crime laboratory of the local sheriff's department, testified. He stated that his later testing of appellant's car for blood "was negative except for a weak positive on an area of" the trunk's carpet. Answer at 10.

B

Although evidence about why an investigator focused on a particular target usually will be irrelevant, *see United States v. Poole*, 30 MJ 271, 275-76 (CMA 1990), appellant's trial strategy changed that in this case. Appellant's explanation for his confessions to OSI agents was that the police had brow-beaten him into making them, and Agent McGibbon's testimony offered an explanation about why, in part, the agents continued to pursue appellant as a suspect.

Of course, that probative value might still, in a given case, be substantially outweighed by the danger of unfair prejudice. Mil.R.Evid. 403. Here, though, the military judge assured that would not be the case. Not only did he offer clear and accurate instructions to the members that properly limited their consideration of the luminol test, but he was assured by the prosecutor that later testimony would show that the presumptive-positive luminol test in the passenger compartment was not confirmed in subsequent testing. This combination of limiting instructions and Mr. Gregonis' testimony virtually

assured that appellant would not be unfairly prejudiced by Agent McGibbon's testimony.[3]

III

WHETHER THE MILITARY JUDGE ERRED TO THE SUBSTANTIAL PREJUDICE OF APPELLANT BY THE ADMISSION OF CERTAIN PHOTOGRAPHS OF THE VICTIM AND THE CRIME SCENE WHICH WERE UNFAIRLY PREJUDICIAL AND CUMULATIVE OF OTHER PROPERLY ADMITTED PHOTOGRAPHS.

During trial, the defense objected to eighteen photographs of the victim and crime scene and a videotape of the crime scene offered by the prosecution. Partially overruling the objection, the military judge admitted ten of the photographs, excluding the remaining photos as well as the videotape. Of the ten, four were of the victim: One was a color photo taken at the murder scene, and the other three were black-and-whites from the autopsy.

---

[3] Notwithstanding the limiting instruction, trial counsel remarked during his closing argument to the members:

> And then he says that it was—in the front it was the other guys who did it, that he was away a little bit but it was the other guy standing over the victim and beating him, that the other guy got soaked with blood. These other guys went out and got in the back of his car without changing their clothes, and *there's no blood found in the back of his car, that is, in the rear passenger section. The only blood found which led them on was in the front.*

(Emphasis added.) Although this comment strayed from the permissible limits of the evidence just discussed, defense counsel did not object to the argument and so waived his appellate complaint. *See* RCM 919(c), Manual, *supra*. In the context of this case and considering all the other evidence, including appellant's confessions, this isolated remark was not plain error that this Court will notice even in the absence of objection. *See United States v. Fisher*, 21 MJ 327 (CMA 1986).

Throughout his appeal, appellant has complained that the four photographs of the victim that were admited unfairly inflamed and shocked the members. *See United States v. White*, 23 MJ 84 (CMA 1986). The Government, in response, acknowledges the nature of the pictures but argues that they necessarily and appropriately reflect the violent nature of the attack on Handy. The Government points out, as it did at trial, that it had elected not to offer more graphic autopsy pictures out of a similar concern as appellant's.

Appellant is correct "that photographs are not admissible for the illegitimate purpose of inflaming or shocking the court-martial." *Id.* at 88. *See* Mil.R.Evid. 403. He must remember, however, that, "[i]f 'the item of proof is admissible for a legitimate purpose, the fact that it also may possibly tend in this undesirable direction is, in and of itself, no ground for reversal.' *United States v. Bartholomew*, 1 USCMA 307, 314, 3 CMR 41, 48 (1952)." 23 MJ at 88.

Our review of the photographs in the context of their use at trial during testimony of prosecution witnesses persuades us that the military judge correctly ruled that the "probative value" of the photographs "far outweigh[ed] the danger of unfair prejudice" to appellant. As we concluded in *United States v. White, supra* at 88:

> [T]he photographs were introduced for a legitimate purpose and aided the factfinding process by making . . . testimony easier to understand. Of course, "[a person who has been brutally murdered by a vicious beating to his head] is not a pretty picture[.]" Here, however, the probative value of the evidence far outweighed any danger of unfair prejudice. Accordingly, we find no abuse of discretion by the military judge in admitting the photographs.

(Citation omitted.)

IV

WHETHER THE COURT OF MILITARY REVIEW ERRED TO THE SUBSTANTIAL PREJUDICE OF APPELLANT IN HOLDING THAT CHARGE I, MURDER BY STRIKING WITH A BASEBALL BAT, AND CHARGE II, ASSAULT BY STRIKING WITH A BASEBALL BAT, WERE NOT MULTIPLICIOUS FOR SENTENCING.

The military judge appropriately submitted to the members the issue as to how these events had unfolded. He instructed them that, if they found appellant had gone to see the victim with the specific intent to kill him, the two charges would be multiplicious for findings; in that event, they should find appellant not guilty of Charge II, the assault. However, if they believed what appellant had stated in his confessions—that he went to Handy's workplace only to beat a lesson into him and then, after escorting him to the bathroom to help him clean up the blood, had changed his mind and decided to kill him by another, fatal beating—the charges would not be multiplicious.

By their separate findings of guilty to both charges, the members have indicated their factual conclusion of appellant's intent. Now he complains, however, that they should be treated as multiplicious for sentencing.

At the outset, it must be noted that appellant did not raise sentence multiplicity as an issue at trial. Moreover, given the implicit finding of fact discussed above, appellant's crimes were not offenses arising from a single impulse or insistent flow of events with like object or intent of the sort that this Court has sometimes treated as multiplicious for sentencing, *see United States v. Burney*, 21 USCMA 71, 74-75, 44 CMR 125, 128-29 (1971); rather, they were two distinct criminal acts. *Cf.*

United States v. Traeder, 32 MJ 455, 456-57 (CMA 1991). Accordingly, appellant's argument to the contrary is without merit.

DECISION

The decision of the United States Air Force Court of Military Review is affirmed.

Chief Judge SULLIVAN and Judges COX, CRAWFORD, and GIERKE concur.

APPENDIX B

UNITED STATES AIR FORCE COURT OF MILITARY REVIEW

ACM 28760

26 August 1991

UNITED STATES

v.

MASTER SERGEANT DONALD R. BURKS, JR.,
FR438-84-1604
UNITED STATES AIR FORCE

Sentence adjudged 16 April 1990 by GCM convened at George Air Force Base, California. Military Judge: Michael B. McShane.

Approved sentence: Dishonorable discharge, confinement for life, and reduction to E-1.

Appellate Counsel for the Appellant: Mr. William Holmes (argued), Lieutenant Colonel Jeffrey R. Owens, Major Ronald G. Morgan, and Major Ronald A. Gregory.

Appellate Counsel for the United States: Major Morris D. Davis (argued), Colonel William R. Dugan, Jr., Lieutenant Colonel Brenda J. Hollis, and Major Paul H. Blackwell, Jr.

Before

O'HAIR, MURDOCK, and RIVES
Appellate Military Judges

OPINION OF THE COURT

O'HAIR, Senior Judge:

A general court-martial composed of officers found appellant guilty of the unpremeditated murder of Sgt Handy and of assaulting the same Sgt Handy with the intent to inflict grievous bodily harm. Although he had been charged with both assault and premeditated murder (as a capital offense), the appellant's conviction of the assault and the lesser degree of murder resulted in a sentence of a dishonorable discharge, confinement for life and reduction to E-1.

The evidence presented at trial disclosed that Sgt Handy was working alone on a night shift in the civil engineering service call office on the morning of 25 September 1989 when he was savagely murdered. The Office of Special Investigations (OSI) immediately initiated an investigation which included bringing in civilian experts to make a blood spatter analysis and conduct an autopsy on Sgt Handy to determine the cause of death. After conducting Behavioral Analysis Interviews of approximately 150 people, they eventually narrowed the list of possible suspects to about a dozen. The appellant was included in that small group and finally became a suspect after taking a polygraph test. In the post-polygraph interview he denied any misconduct, but continued to submit himself to questioning and gave OSI agents consent to search his house, car, and gym and bowling alley lockers. After two and one-half days of interviews and other interactions with various OSI agents, the appellant

tearfully confessed he had killed Sgt Handy by repeatedly hitting him with an aluminium baseball bat. Appellant first gave an oral confession which was followed by his own typewritten version, and this was later expanded upon in a second typewritten confession. While still with an OSI agent he tearfully repeated his confession to a friend.

Appellant explained that his motivation for the killing was that he was upset with Sgt Handy for allegedly molesting a 13-year-old girl who had a mental age of 9. The appellant was frustrated by the fact that the local civilian jurisdiction had apparently felt there was insufficient evidence to prosecute Sgt Handy and the latter was almost gloating that the civilian charges had been dropped. Therefore, the appellant seems to have decided to impose his own form of justice and he went to Sgt Handy's workplace with the intention of assaulting Sgt Handy and then departing. Appellant further confessed that, following the initial assault to Sgt Handy's head with the baseball bat, he escorted Sgt Handy from the service call area to the men's bathroom to help him clean up the blood. When they arrived at the bathroom area, the appellant then began repeatedly striking Sgt Handy in the area of the head. At the conclusion of this mortal assault the appellant went home, washed his clothes, shoes, and the baseball bat, and began getting his uniform ready for work that day.

Approximately three days after the appellant confessed to killing Sgt Handy he recanted his confession and described a situation in which three men, wearing stars painted on their cheeks and earrings in their right ears, came to his home early in the morning of 25 September. By means of a threat to injure his children, they forced him to drive them to where they could find Sgt Handy. When he let them into the dark civil engineering building, he watched as two of them used a baseball bat and another unique weapon to bludgeon Sgt Handy. Ap-

pellant said he was then ordered to take the killers to their car and as they left him they again threatened him with injury to his children if he reported any of this assault for at least four weeks.

Two months after the recantation of the confession the security police found a letter in a military van used to transport prisoners, including the appellant. The letter was signed by "Michael" and was addressed to the appellant. In that letter Michael wrote that he was the homosexual lover of Sgt Handy and that members of a homosexual cult, not the appellant, had killed Sgt Handy. Michael also said he would be writing letters and preparing a video tape about this killing which he would be sending to various influential persons, and that ultimately he was going to commit suicide. A fingerprint and handwriting analysis of the letter could not determine who authored it and no further information about this missive was discovered.

In one of the best litigated military cases we have read, the counsel on both sides and the military judge were extremely professional and complete in their treatment of all the relevant issues which developed during the trial. The most significant of those issues and the one which received most of the attention during oral argument before us involved the letter from Michael which was discovered in the security police van. This letter gained prominence because, at the onset, the defense disclosed their theory of the case to be that Sgt Handy was killed by a homosexual group and that appellant confessed to the crime only for the purpose of protecting his children from those killers. In addition to appellant's sworn testimony on the merits, the primary defense evidence was to be this anonymous letter from Michael which the defense attempted to introduce in a pretrial session pursuant to a motion for admission of exculpatory evidence. The denial of the defense motion for admission of this letter serves

as the focal point for appellant's prayer for relief before this Court.

The appellant's argument before us, and at trial, is that his due process right to present a defense was denied by the improper exclusion of exculpatory evidence, the letter from Michael. The appellant sought to introduce the letter under the residual hearsay exceptions: Mil.R.Evid 803(24) and 804(b)(5), and also as a statement against interest, Mil.R.Evid 804(b)(3). The military judge denied the defense motion for admission because the letter was hearsay which did "not even come close to the threshold requirements for trustworthiness and reliability." He explained that trustworthiness was a prerequisite for admission under both suggested possibilities and, lastly, under a Mil.R.Evid 403 balancing, he found the letter was not admissible because of the danger of possible confusion that its introduction would cause the court members.

We believe the military judge was correct in his determination. A military judge has considerable discretion to act upon preliminary questions addressing admissibility of hearsay evidence. *United States v. White,* 17 M.J. 953. 956 n.5 (A.F.C.M.R. 1984); Mil.R.Evid 104(a). The burden in that instance is clearly upon the party seeking introduction of this evidence to prove the military judge's exclusion is an abuse of his discretion. *United States v. Mukes,* 18 M.J. 358 (C.M.A. 1984). Similarly, the military judge is inherently given broad authority to exercise his discretion when applying the balancing test found in Mil.R.Evid 403 to proffered evidence; and again the judge's decision will be respected upon appeal unless the appellant can show abuse. *Id.* 18 M.J. at 359.

The appellant suggests the military judge's exclusion of this exculpatory evidence resulted from his arbitrary and unreasonable application of the residual hearsay exception. For support appellant cites *Chambers v. Mississippi,* 410 U.S. 284, (1973) which provides the following:

> [W]here constitutional rights directly affecting the ascertaining of guilt are implicated the hearsay rule may not be applied mechanistically to defeat the ends of justice.

Id., 410 U.S. at 320.

This quote, however, overlooks that Court's remarks earlier in the decision wherein the philosophical background for application of the hearsay rule is provided. This is a theory we adopt as well. The Court explained that the hearsay rule is not a novelty, but rather a rule of evidence which is "based on experience and grounded in the notion that untrustworthy evidence should not be presented to the triers of fact." For this reason statements which are made out of court, not under oath, not subject to cross examination, and not made before court members who can assess the demeanor of the witness are traditionally excluded. *Chambers*, 410 U.S. at 298. The exceptions to this hearsay exclusion are those statements which a trial judge believes have an indicia of reliability and therefore should be considered by the court members despite their status as hearsay.

The hearsay statement involved in this case is a letter which is addressed to the appellant, is dated 4 November 1989, and was discovered two weeks later on the floor of the driver's side of a security police van used to transport military prisoners earlier that morning. The author of the letter says his name is Michael, but there is no last name, return address or telephone number which would assist in contacting him. Michael purports to exculpate the appellant by explaining that the victim was killed by members of a homosexual/drug cult and the author and the victim were members of the same cult. The author relates information about the victim and his activities; however, this is primarily information already made public by the appellant and for which there is no other way to verify.

Additionally, the author explained that he had mailed letters containing incriminating materials to local newspapers and Air Force authorities which would supposedly exonerate the appellant. He also indicated his intention to leave a package containing more incriminating materials at a Miami post office. OSI witnesses testified that none of these materials were ever received. The government's handwriting expert eliminated all suspected authors, but catgorized their analysis of appellant's handwriting sample as only "inconclusive".

We examined this letter and, being unaware of any corroborating sources, conclude, as did the military judge, there is a complete absence of any indicia of reliability. Although there is no evidence of who authored it, all fingers point to the appellant. The letter is a completely self-serving document which elaborates on a sequence of events surrounding Sgt Handy's murder which appellant described several days after his confession, but for which there is no corroboration other than from the appellant. Lastly, the timing and location of its discovery suggests one plausible theory which is that the appellant placed the letter in the military van, perhaps under the rear of the driver's seat of the vehicle, and it finally worked its way forward on the day of its discovery. Disregarding the appellant's theorized authorship and delivery of this letter, we find the military judge did not abuse his discretion in not granting the appellant's motion for its admission. Nothing presented by appellant or available to the prosecution provided any semblance of trustworthiness to this document which could serve as a basis for the court members to conclude the document was an authentic, truthful representation of how Sgt Handy was murdered. For these reasons, the appellant was not denied his due process rights when the military judge refused to permit this document to be given to the court members. *United States v. White* and *United States v. Mukes,* both *supra.*

II

In Error II, appellant alleges that government psychological coercion rendered his waivers of Article 31, UCMJ, rights ineffective and thus his confessions involuntary. We remain unconvinced. It is true that from mid-day on 10 October until he confessed on mid-day 12 October, the appellant spent his day time hours with the OSI special agents either being questioned, polygraphed, or just waiting for their next investigative step. All interviews were conducted in a relaxed, pleasant atmosphere. The six agents who were personally involved in this investigation at various stages explained they advised the appellant of his rights before every interrogation session and every request for a search authorization. They also offered him food and refreshments at reasonable intervals and never indicated to him he was not free to leave. This was shown to be true when he requested they terminate a session on the afternoon of the 10th of October because he had to go home to take his children to football practice. In fact, appellant even acknowledged that the agents had advised him of his Article 31 rights 18 times in three days. At none of those times did he exercise his right to remain silent, ask for an attorney, or otherwise indicate his unwillingness to cooperate with them.

The agents described the appellant during these three days as being cooperative and after he confessed he was both thankful and apologetic for lying to the agents. He also confided to them that he would have confessed on the 11th if anyone had interviewed him that day and asked him the question.

This issue was raised at trial and, following his receipt of testimony, the military judge properly concluded the appellant had voluntarily waived his Article 31 rights and his confessions were not the result of coercion. We agree with his decision and the detailed finding of fact in which

he found the prosecution had satisfied its burden of proving that the appellant had voluntarily waived his right to remain silent and to the assistance of an attorney. *United States v. Massengill,* 30 M.J. 800, 805 (A.F.C.M.R. 1990); *United States v. Jenkins,* 24 M.J. 846, 848 (A.F.C.M.R. 1987), *pet. den.* 26 M.J. 70 (C.M.A. 1988); Mil.REvid 304(e)

III

Appellant next asserts that the military judge abused his discretion by admitting four specific photographs of the victim. One of these was a color photo of the victim at the murder scene and the remainder were black and white autopsy photos which showed the extent of the injuries to the victim's face. The defense had objected to 15 of the prosecution photographs and a video tape of the crime scene on the grounds that they were unduly prejudicial because of their graphic nature, and they were cumulative with other photograph already admitted. The military judge reviewed all of the materials and admitted only eight of the 15 photographs, keeping out the remaining seven and the video tape. The judge further limited the prosecution to giving only one set of the photographs to the court members, not a set for each member.

Military judges must properly exercise discretion when asked to rule on the admissibility of potentially inflammatory photographs and should exclude any photographs whose probative value is outweighed by the danger of unfair prejudice. Mil.R.Evid 403; *United States v. Coleman,* 36 C.M.R. 574 (A.B.R. 1965), *pet. denied,* 36 C.M.R. 541 (C.M.A. 1966) In *United States v Mobley,* 28 M.J. 1024 (A.F.C.M.R. 1989) this Court found the military judge erred by admitting autopsy photographs showing the victim's skull In the instant case, the photographs offered and admitted by the military judge were not only screened by him but also played a vital role in

the prosecution's presentation of its case. They were vivid and not pleasant to examine, but under the circumstances it was not an abuse of discretion for the military judge to admit them as evidence.

IV

The next assignment of error we will address concerns multiplicity. The evidence presented at trial described a crime scene in which the victim was attacked first in the service call area and later in the bathroom area where he subsequently died. This is corroborated by appellant's confession, as well as the locations and analysis of the blood spatters. This fact pattern served as the basis for the government's theory of the case and their decision to charge him with both premeditated murder and assault with intent to inflict grievous bodily harm. Appellant urges that these charges are multiplicious for both findings and sentence. The appellant raised only the issue of findings multiplicity at trial and the military judge announced he would let the court members decide the issue. In doing so he instructed the members that if they found appellant had gone to see Sgt Handy with the specific intent to kill him, the two charges would be multiplicious for findings. However, if they believed what he said in his confession (that he went there only to assault him and then leave, but changed his mind after the first assault and reinitiated it by the bathroom), the charges would not be multiplicious. We agree this was the proper approach; the ultimate findings of the court members are supported by facts.

On the issue of multiplicity for sentencing, although this was not raised at trial, we find the events surrounding the assault and later death of Sgt Handy were not committed as a result of a single impulse or insistent flow of events, and therefore were not multiplicious for sentencing. *United States v. Crowe*, 30 M.J. 1144, 1146 (A.F.C.M.R.

1990). *See also United States v. Traeder,* 32 M.J. 455 (C.M.A. 1991).

V

In a final issue, the appellant alleges it was error for the military judge to admit Sgt Handy's airman performance reports, his awards and decorations and a newspaper photograph of the victim in the company of other Humane Society members. The military judge relied on the policy of the Victim and Witness Protection Act and *United States v. Pearson,* 17 M.J. 149 (C.M.A. 1984) for authority to admit this documentary evidence. It was clearly appropriate for the government to be able to show the impact of the loss of Sgt Handy on society, including the Air Force.

The remaining assignments of error have been considered and found to be without merit. The findings of guilty and the sentence are

AFFIRMED.

Senior Judge MURDOCK and Judge RIVES concur.

OFFICIAL

[SEAL]

/s/ Laura L. Green
LAURA L. GREEN
Clerk of Court
Air Force Court of Military Review

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No. 93-142

In the Supreme Court of the United States

OCTOBER TERM, 1993

DONALD R. BURKS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner was denied a fair trial when the trial judge excluded from evidence an anonymous note purportedly written by another person claiming to have committed the murder for which petitioner was convicted.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Military Appeals, Pet. App. A, is reported at 36 M.J. 447. The opinion of the Air Force Court of Military Review, Pet. App. B, is not officially reported.

JURISDICTION

The judgment of the Court of Military Appeals was entered on April 29, 1993. The petition for a writ of certiorari was filed on July 27, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1259(3) (Supp. III 1991).

STATEMENT

Petitioner, a member of the United States Air Force, was tried by a general court-martial for premeditated murder and aggravated assault, in violation of Articles 118 and 128 of the Uniform Code of Military Justice, 10 U.S.C. 918 and 928. He was convicted of unpremeditated murder and aggravated assault, and he was sentenced to confinement for life, a dishonorable discharge, and reduction to the lowest enlisted grade. The convening authority affirmed the findings and sentence. The Air Force Court of Military Review affirmed the findings and sentence. The Court of Military Appeals granted discretionary review and affirmed.

1. Sergeant Joseph Handy was beaten to death while working alone in the early morning of September 25, 1989, at George Air Force Base in California. Behavioral analysis interviews by agents of the Air Force Office of Special Investigations (OSI) and subsequent polygraphs led the OSI to focus its investigation on petitioner. He ultimately confessed to killing Handy by numerous blows with an aluminum baseball bat. Petitioner amplified his oral confession in two written versions. In his confessions, petitioner expressed outrage at Handy's alleged admission that he had molested a young girl and Handy's boast that he was getting away with it. Petitioner claimed that he decided to teach Handy a lesson by beating him. After beating Handy in his office, petitioner took him to the bathroom to clean away the blood. While there, petitioner began to beat Handy again and eventually killed him. Pet. App. 2a-3a, 17a-18a.

Three days after confessing, petitioner recanted and claimed that the OSI had coerced him into making the statements. Rather, he claimed, three men with stars painted on their cheeks and earrings in their right ears had forced him to take them to Handy's office, where two

of them beat Handy to death with a bat and an unusual weapon of some sort. Petitioner stated that those men threatened to injure his children if he mentioned the killing within four weeks. Pet. App. 3a, 18a-19a.

2. Petitioner's claim stems from the discovery on December 18, 1989, of an anonymous note in a security police van used to transport petitioner. The note purportedly exonerated petitioner in the death of Sergeant Handy.[1] The note was purportedly authored by a person named "Michael" who claimed that he was the homosexual lover of Sergeant Handy. "Michael" claimed that he and Sergeant Handy were members of a homosexual cult, and that Sergeant Handy was murdered by members of the cult for dishonoring the cult leader. "Michael" claimed he had written to local newspapers and Air Force authorities explaining the circumstances surrounding Sergeant Handy's death. He also promised to provide Air Force officials with evidence proving his allegations, including videotapes, pictures, maps, telephone numbers, and names. In fact, there was no evidence that anyone had in fact written the letters referred to in the note, and no evidence was provided to petitioner or Air Force officials as the note had promised. Pet. App. 3a-4a.

The parties stipulated that the note was found in an unlocked van at about 9 a.m. and that the van had been used that morning between 6 and 6:30 a.m. to transport petitioner and other confinees to and from breakfast. AX 26, ¶ 1d. No fingerprints were found on the note. Handwriting analysis failed to determine who had authored the note; the examiner's comparison of the note with an exemplar from petitioner was inconclusive. An OSI investigation based on the matters set forth in the note failed to uncover any relevant information. The identity

[1] A transcription of the note is appended as attachment 1 to AX 28.

of the author of the note was never determined. AX 26, ¶¶ 3-8, 11.

3. Before trial, petitioner's counsel filed a motion in limine seeking a ruling on the admissibility of the note. Tr. 52; AX 25. Counsel claimed the note was admissible on three grounds: (1) under Mil. R. Evid. 804(b)(5), the residual hearsay exception when the declarant is unavailable; (2) under Mil. R. Evid. 803(24), the residual hearsay exception when the availability of the declarant is immaterial; and (3) under Mil. R. Evid. 804(b)(3), as a statement against penal interest. Tr. 53-54. The prosecutor opposed petitioner's motion to admit the note on several grounds, among them that the declarant was not merely unavailable, but unknown, and that the note lacked the guarantees of trustworthiness necessary for it to be admissible under the residual hearsay exceptions. Tr. 56-57, 59-61.

The trial judge ruled that the note was inadmissible. Tr. 64. He noted that the purported declarant was not just unavailable, but was unknown. Tr. 62. He determined there was no way to test the trustworthiness of an anonymous note written by an unknown author. In fact, he said: "This anonymous letter does not even come close to the threshhold [*sic*] requirements for trustworthiness and reliability." Tr. 63. He also found that any probative value the note might have was substantially outweighed by the danger of confusion of the issues under Mil. R. Evid. 403. Tr. 64.

4. The court of military review affirmed. Pet. App. 16a-26a. It concluded that "there is a complete absence of any indicia of reliability." *Id.* at 22a. "Nothing presented by [petitioner] or available to the prosecution provided any semblance of trustworthiness to this document which could serve as a basis for the court members to conclude the document was an authentic, truthful representation of how [Sergeant] Handy was murdered." *Ibid.*

The court added that "[a]lthough there is no evidence of who authored [the note], all fingers point to [petitioner]." *Ibid.*

5. The Court of Military Appeals affirmed. Pet. App. 1a-15a. Like the trial court and the court of military review, the Court of Military Appeals found that the note lacked the necessary indicia of trustworthiness that would have allowed the note to be admitted under an exception to the hearsay rule. *Id.* at 6a-9a.[2] The Court also rejected petitioner's claim that the note was admissible under *Chambers* v. *Mississippi*, 410 U.S. 284 (1973). *Chambers*, the court reasoned, does not entitle the accused to introduce evidence "the fundamental trustworthiness of which is wholly unestablished" by the defense at trial. Pet. App. 9a.

ARGUMENT

Petitioner has narrowed his argument from his submission in the courts below. In the military courts, petitioner argued that the note discovered in the security van was admissible under one or more of three different exceptions to the rule against hearsay, Mil. R. Evid. 803(24), 804(b)(3), and 804(b)(5). In this Court, petitioner no longer claims that the note was admissible under one of those exceptions; rather, he contends only that his due process rights were denied when the trial court excluded the note on the ground that it was inadmissible hearsay. Relying on this Court's decision in *Chambers* v. *Mississippi*, *supra*, petitioner contends

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[2] That court added that "we are at a loss to understand how it may logically be concluded that the *anonymous* writer of a self-incriminating letter has made any statement that truly is against the writer's penal interests. * * * A 'confession' by one who speaks from the shadows and remains unidentifiable hardly measures up to the rationale that a statement made against the declarant's own interests is, therefore, reliable." Pet. App. 8a n.2.

that the rule against hearsay must give way in circumstances like this one, where reliable evidence critical to the defense would be excluded from trial.

The flaw in petitioner's argument is that the note discovered in the security van was not reliable evidence. Each of the three courts below correctly found that petitioner had failed to establish that the note had sufficient indicia of reliability to warrant its admission.

Petitioner lists a variety of factors that, he claims, establish the reliability of the note. Pet. 5-8. None of the factors he cites, however, establishes that the note was written under circumstances indicating that the declarant was trustworthy. Since petitioner did not prove that the declarant penned the note under circumstances proving that he should be believed, the trial court correctly excluded the note from evidence.

Moreover, the factors petitioner cites to establish that the note was reliable cannot carry the weight he ascribes to them. While some of the factual assertions in the note are generally correct, those facts would have been available to anyone familiar with Sergeant Handy and the investigation of his death—petitioner himself, for instance. Also, many of the assertions in the note were never corroborated at all. There was never any evidence of a homosexual cult, and OSI found no evidence that Sergeant Handy had been involved in homosexual activity. Tr. 694, 742. Petitioner also claims that the events described in the note were corroborated by other evidence. In particular, he points to evidence that a second weapon was used to murder Handy, evidence of a footprint that did not match petitioner's shoes, and evidence that an earring back was found near the crime scene. While a pathologist testified that a second weapon in addition to the baseball bat could have been used to inflict the injuries to Handy, Tr. 880-881, petitioner admitted that he disposed of a metal object by throwing it

into a dumpster after the murder, Tr. 1123. Petitioner also admitted that he had ample opportunity to dispose of the shoes he might have worn on the night of Handy's murder, Tr. 1157, so petitioner himself could have left the footprint. And anyone could have dropped the earring back. It was found about six feet from Sergeant Handy's body next to the women's restroom. Tr. 687. Between eight and ten women worked in that particular building, and they all wore earrings. Losing an earring back is not an uncommon event. Tr. 786-787.

Petitioner claims there was no evidence that the note was a fabrication based on the handwriting analysis. The examiner, however, could not identify the author of the note and his comparison of the note with petitioner's exemplar was inconclusive. AX 26, ¶ 8. Thus, there was no evidence the note was not a fabrication. Also, the note was found in a van that was left unlocked and unattended—a van that petitioner had occupied just a few hours before. Practically anyone, including petitioner, could have planted the note. Petitioner further claims the contents of the note support his claim that he confessed to protect his children. But petitioner never expressed any concern for the safety of his children to OSI. Tr. 695-696, 1205-1206, 1208. If, as he said at trial, petitioner was concerned that the cult members would retaliate against his children if he told the authorities about Handy's murder, surely petitioner would have insisted that the OSI protect his children; otherwise, he would have feared that the cult members might injure his family once they learned that he was in police custody. In sum, the factors petitioner invokes to establish the reliability of the note are unimpressive.

This case is vastly different from *Chambers* v. *Mississippi*, *supra*. There, this Court held the defendant's right to present a defense was infringed by a state voucher rule. In that case the defendant was alleged to

have murdered a police officer. Some witnesses testified the defendant fired the shot that killed the officer, while others testified someone else had done so. Another man told defense counsel, as well as three other individuals, that he, not the defendant, fired the shot. The prosecution, however, did not call that man at trial. Instead, the defense called him as a witness, and he denied having shot the officer. Relying on the voucher rule, a common law rule that barred a party from impeaching its own witness, the trial judge refused to permit the defense to confront the witness with his prior inconsistent statements. The trial court also denied a defense request to call the three persons to whom the witness had previously confessed. This Court reversed, holding that the combined operation of the state voucher and hearsay rules denied the defendant a fair trial. 410 U.S. at 295-302. In particular, the Court noted that the witness's statements "were originally made and subsequently offered at trial under circumstances that provided considerable assurance of their reliability." *Id.* at 300. The Court also noted that any question of the truthfulness of the statements was allayed by the declarant's presence at the trial. *Id.* at 301 & n.21.

This Court in *Chambers* found that several factors, taken together, provided adequate assurance of the truthworthiness or reliability of the hearsay statements in that case. 410 U.S. at 300-301. None of those factors, however, is present here. First, the statement here was not made spontaneously to a close acquaintance of the declarant shortly after the commission of the crime. Second, the statement was not sufficiently corroborated by substantial, independent evidence, as explained above. Third, the statement was not against the declarant's interest, because the note was anonymous, no declarant was ever discovered, and petitioner himself could have authored the statement. And, fourth, the declarant was

not available for cross-examination by the government (unless, of course, petitioner wrote the note). Under these circumstances, the Court's decision in *Chambers* did not require admission of the note. See *United States* v. *Hinkson*, 632 F.2d 382 (4th Cir. 1980) (holding third party's confession inadmissible because it lacked substantial guarantees of trustworthiness); *United States* v. *Hughes*, 529 F.2d 838 (5th Cir. 1976) (finding *Chambers* inapplicable because, inter alia, the hearsay statement bore no assurances of trustworthiness).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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